BRIEF

IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A.

OPINION OF COURT BELOW.

The decision of said Circuit Court of Appeals was filed June 9, 1943, is a final judgment, and is published in the ..... F. 2d ..... (R. 77-85).

B.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS BASED.

These grounds appear as a part of the foregoing Petition for Writ of Certiorari, and are adopted and made a part of this brief.

C.

STATEMENT OF THE CASE.

The proceeding in said Circuit Court of Appeals was an appeal to review a decree of the said District Court at Kansas City, dismissing for want of jurisdiction a suit in equity by infant citizens and residents of Oklahoma with adult citizens and residents of Texas and Indiana, against citizens and residents of Missouri, to prevent the enforcement of a State court judgment, procured by fraud, without service of process, or notice, and to enjoin conspirant producers of a counterfeit Will by them probated and prosecuted as its chief beneficiaries to a judgment, under which petitioners had their rights and property taken without due process of law, in violation of Section 1

of the 14th Amendment to the Constitution of the United States (R. 1-8).

The judgment described in the complaint arose out of a strange and sudden death on March 6, 1936, at Slater, Missouri, of Laura E. Saltonstall, age 68, a childless widow, devoted to her kin, survived by brothers, sisters, nephews and nieces, of whom are your petitioners. She lived alone in her home with respondent, Laura Thomas Sheppard, a boarder, quasi-ward and domestic, of no kin, and on March 5, 1936, was in good health, visiting with 2 nephews, one in morning and other at night, referred to certain property given her in Trust by her father, for her brothers and sisters and surviving children, said she had already made that provision in her Will, and, opening her trunk, a bed-room repository for her valuables, took therefrom a Will dated October, 1935, read it to her nephews, replaced it in her trunk, locked it, remarking it would be there when needed, and hung the key around her neck (R. 5). Next day, Friday, March 6, 1936, after supper, she was seized with a sudden illness—a doctor was called at dusk, her kin a few doors distant unnotified. Saturday morning, March 7, 1936, as a nephew was going to work, noticing a hearse in front of her home, going in found Undertakers carrying away his Aunt's body and Laura Thomas Sheppard communicating with her co-conspirators the other respondents herein who intruded themselves into possession of the home of decedent and the repository trunk in which her last Will was placed the preceding Thursday night, removed from the trunk money and other property, and later produced a two-dated counterfeit will, witnessed by their chosen undertakers, with respondent, Laura Thomas Sheppard, and Leta Butler and Rozell Griffith, also once quasi-domestics of decedent, and strangers to her blood, as chief beneficiaries and devisees, with Com. P. Storts as Executor (R. 5). Later, a will contest suit was instituted by a nephew of decedent—all blood heirs, including your petitioners, were made parties defendant. Your petitioners,

adult citizens of Texas and Indiana, were brought in by substituted service of an unlawful publication in a local county newspaper; your petitioners, infant citizens of Oklahoma, were, by publication, illegally brought in, a guardian *ad litem* unlawfully appointed for them, without service of summons, petition or notice, when the statutes of Missouri demand they shall be first personally served before they can be in court for any purpose. All of the said Saline County parties knew the whereabouts and post-office address of petitioners herein, and knew that they could be personally served in accordance with the non-resident statute, but they evaded it and the judge of the court did not require it; yet, a judgment was entered against your infant and adult petitioners, devesting all blood heirs, including your petitioners, of their rights, titles and interest in said Estate, not named in said undertaker witnessed document.

Your petitioners, record parties to said suit, and against whom a final judgment was rendered, without lawful service of process or notice, first learned of said proceedings after the mandate from the Supreme Court of Missouri was sent down to the trial court on February 26, 1941 (R. 6).

May 31, 1941, your petitioners, as plaintiffs therein, filed suit in Equity in said District Court at Kansas City, setting out in the complaint (R. 1-10) ultimate and constitutive facts which invoke an application or construction of the Constitution of the United States, namely: Section 2, Article III, Section 3, Article IV, and the 14th Amendment to the Constitution of the United States.

The complaint specifically alleges the acts and conduct of said respondents; how they entered into an unlawful conspiracy to cheat and defraud the heirs of Laura E. Saltonstall; how they did, on March 6, 1936, collusively and wrongfully take possession of the lifeless body of Laura E. Saltonstall, her residence, trunk, and property, destroying her last will, dated in October, 1935, and, after a hasty funeral to prevent the heirs from exhuming her

body, made and produced a bogus will, dating it September 1, 1933, and December 2, 1934, naming themselves as chief beneficiaries, Storts as Executor; how they then presented this forged document to the Probate Court, representing it as her last will and testament; that the Judge of Probate, *ex-parte*, in vacation, admitted it, but failed to make an order of confirmation by the Probate Court in Term-time as required by the statutes of Missouri (Sec. 528, R. S. Mo., 1929, now Sec. 539, R. S. Mo., 1939), causing said attempted probation to become null and void and depriving the Circuit Court of Saline County of jurisdiction, so the rendition of its judgment was a nullity. Nevertheless, the property of your petitioners was taken possession of by respondents, who proceeded to and did make deeds of conveyance to each other, dividing the lands of said estate among themselves; how, with fraudulent pretenses, false and perjured testimony, fictitious and forged documents and other fraud, respondents gained an unconscionable advantage for which reasons they should be enjoined from having the benefits of said judgment and prevented from enjoying the fruits of their iniquity (R. 10).

D.

SPECIFICATIONS OF ERROR.

1. The court below erred in sustaining the rulings, orders and decree of the District Court, and holding that the complaint involved no Federal Question, no violation of Section 2, Article III, or Section 2, Article IV, or of Section 1 of the 14th Amendment to the Constitution of the United States.

2. The court below erred in sustaining the rulings of the District Court, and holding that the Judge of the Circuit Court of Saline County, Missouri, in rendering his judgment, did not act for the State, and did not come under the provisions of the 14th Amendment to the Constitution of the United States.

3. The court below erred in sustaining the rulings of the District Court, and in holding that Frank Bush's sworn statement, adoption of the complaint and application to be made a party plaintiff, with copy of complaint attached to his affidavit, voluntarily, in good faith, made and filed by him with permission of the court, may be abrogated by a later unsworn, unauthenticated, inconsistent, ancillary, purported entry of appearance as a defendant and a $500 interest from the forged will, with a $2,000 interest as a plaintiff, which last filing was a trick and a fraud to deceive and mislead the court and affect its jurisdiction, when he was not an indispensable party, had no part in the forgery of the will or other charged frauds, and, under the rules of procedure for District Courts, should have been aligned as an involuntary plaintiff, which amounts to a violation of the intendment of the Constitution of the United States which declares that one of its prime purposes is the establishment of justice.

4. The court below erred in sustaining the rulings of the District Court, and in holding a misconception of the nature of this action, considering it on the basis of a will contest suit, instead of an original action in Equity, whose processes are to prevent the use of the law to effect injustice, to guard rights, privileges and immunities of citizens, and to enjoin and deprive forgers and thieves of their plunder; and applying this misconception in various rulings so that it conflicts with the admitted facts, the statutes and decisions of the courts of Missouri, amounting to a violation of the intendment and theory of the establishment of justice declared by the Constitution of the United States.

E.

SUMMARY OF THE ARGUMENT.

Point I.

The court below should be reversed, because a Federal Question is involved in this case. When property is

taken by a void judgment, procured by fraud, without service of process or notice, and when petitioners are denied equal protection, their rights, privileges and immunities abridged, same are contrary to the guaranties of Section 2 of Article III, Section 2 of Article IV and Section 1 of the 14th Amendment to the Constitution of the United States.

Point II.

Judgment below should be reversed, because the Judge of the State Court was and is the arm of the State, and when he rendered his judgment herein, his act was and is the act of the State, bringing it within the inhibition of the 14th Amendment to the Constitution of the United States.

Point III.

Judgment below should be reversed, because Frank Bush's sworn application to be made a plaintiff, attaching copy of complaint to his affidavit, voluntarily in good faith signed, acknowledged and filed by him in District Court with court's approval, should not be abrogated by a trick, a fraud, by someone filing for him an unsworn, unauthenticated, inconsistent, ancillary, purported entry of appearance as a defendant, in a purposed trick to deceive and mislead the court and affect its jurisdiction, when he is not an indispensable party, had no part in framing the counterfeit will, has only $500 interest under the forged will, with $2,000 interest as a plaintiff from the Estate, and, under the rules of procedure for District Courts, should have been aligned as an involuntary plaintiff; and said acts amount to a violation of the intendment of the Constitution of the United States which declares that one of its prime purposes is to establish justice.

Point IV.

Judgment below should be reversed, because of the misconception of the nature of this action, the court considering it on the basis of a will contest suit, instead of an action in Equity whose processes are to prevent the use of the law to effect injustice and deprive forgers and thieves of their plunder, not to conflict with the admitted facts, statutes and decisions of the courts of Missouri, for such is contrary to the intendment and theory of the establishment of justice declared by the Constitution of the United States.

ARGUMENT.

POINT I.

The Judgment Should Be Reversed for the Reason a Federal Question Is Here Involved, Arising by Violations of the Constitution of the United States, namely: Section 2, Article III, Section 2, Article IV, and Section 1 of the 14th Amendment to the Constitution of the United States.

Jurisdiction of the District Court is determined by the allegations of the original complaint, and when it alleges a taking of property without due process of law in violation of the 14th Amendment to the constitution of the United States, it presents a substantial Federal Question. *Mosher* v. *Phoenix,* 237 U. S. 29-32.

While in *The Proprietors of Bridges* v. *Hoboken Land and Improvement Company,* 1 Wallace 116, 68 U. S. 142, 17 L. Ed. 571, the Court held it was not necessary to give the exact paragraph of the Constitution.

However, the complaint filed in the District Court at Kansas City, uses the following language;

(1) "This action arises under the Constitution of the United States" (p. 1) (R. 1).

(2) "That said judgment so rendered, given and entered without service of summons or notice to these plaintiffs, and without their knowledge or participation in the trial of said cause, was and is as to said plaintiffs absolutely void, without force or effect, and is in contravention of the due process clause contained in Section 1 of the 14th Amendment to the Constitution of the United States" (p. 18) (R. 8).

(3) "That said judgment in the Circuit Court of Saline County, Missouri, rendered and procured by collusion, perjured testimony, fraud, and forged documents, was and is a fraud upon the courts of the land,

upon these plaintiffs, and contravenes and nullifies the establishment of justice, as defined by the Constitution of the United States" (p. 19) (R. 8).

(4) Throughout the complaint (R. 1 to 10), facts are stated which show want of due process of law, want of equal protection under the law, loss of privileges, immunities, rights, titles and interests for want of due process, clearly showing petitioners were seeking protection under the Constitution of the United States and relying upon its guarantees (R. 1 to 10 and 20 to 28).

The complaint should not have been dismissed. As said in *Wetmore* v. *Rymer*, 169 U. S. 115-128, 42 L. Ed. 682-686:

> "A suit cannot be properly dismissed by a circuit court as not substantially involving a controversy within its jurisdiction, unless the fact, when made to appear on the record, creates a legal certainty of that conclusion."

The complaint presented a substantial Federal Question when it alleged an attempted appropriation or taking of petitioners' property without due process of law, in violation of the 14th Amendment to the Constituton of the United States, *Mosher* v. *Phoenix*, 87 U. S. 29.

In Equity.

Complaint abounds with equitable reasons and grounds. The District Court as a court of equity had jurisdiction to entertain the complaint and grant relief. In *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, a similar case and where the complaint alleged fraud and want of notice, Justice Lamar said:

> "If that be so, the United States courts by virtue of their general equity powers had jurisdiction to enjoin the parties from enforcing a judgment thus doubly void."

The Supreme Court of the United States has many times held that in similar cases, District Courts have unqualified jurisdiction and in equity cases may restrain the parties where judgments were obtained in State courts by fraud, improper methods, or without service of process or notice, in the following cases:

Gaines v. *Fuentes*, 92 U. S. 10.
Arrowsmith v. *Gleason*, 129 U. S. 86.
Marshall v. *Holmes*, 141 U. S. 589.
Simon v. *Southern Ry. Co.*, 236 U. S. 115.
Wells Fargo v. *Taylor*, 254 U. S. 175.
Smith v. *Apple*, 264 U. S. 274.
Chase Nat. Bk. v. *Norwalk*, 291 U. S. 431-441.
Packing Co. v. *Gas Co.*, 309 U. S. 4-9.
Kelkam v. *Md. Casualty Co.*, 312 U. S. 377-382.
Toucy v. *N. Y. Life Ins. Co.*, 314 U. S 118-120.

In *Gaines* v. *Fuentes*, 92 U. S. 10-20, Court said:

> "The suit in the Parish Court is not a proceeding to establish a will, but to annul it, as a muniment of title, and to limit the operation of the decree admitting it to probate. It is in all essential particulars *a suit for equitable relief*—to cancel an instrument alleged to be void and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony."

In *Marshall* v. *Holmes*, 141 U. S. 589, Court said:

> "These authorities would seem to place beyond question the jurisdiction of the federal court to take cognizance of the present suit, which is none the less an original independent suit, because it relates to judgments obtained in other courts. While it cannot require the state court itself to set aside or vacate judgments in question, it may, as between the parties before it, adjudge that Mayor shall not enjoy the inequitable advantage obtained by his judgments."

In *Simons* v. *Southern Ry. Co.*, 236 U. S. 115, Court said:

> "In *Julian* v. *Central Trust Co.*, 193 U. S. 112, it was held that the existence of equity did authorize an injunction to prevent plaintiff from enforcing his judgment even though it may have been perfectly valid in itself. This is sufficient to show that if in a proper case, plaintiff holding a valid state judgment, can be enjoined by a United States Court from its inequitable use—by so much the more can the federal courts enjoin him from using that which purports to be a judgment, but is in fact an absolute nullity."

POINT II.

The Judgment Below Should Be Reversed Because the Circuit Court of Saline County, Missouri, Was and Is an Arm of the State, and When It Rendered Its Judgment, It Was and Is the Act of the State of Missouri, and Brings This Case Within the Inhibition of the 14th Amendment to the Constitution of the United States.

The intendment of the law of Missouri is that the State assumes responsibility for the acts of its Judicial arm when it announces in Section 38 of Article VI of the Constitution of Missouri and in Sec. 905, R. S. Mo., 1939, that:

> "All writs and process issued out of any court of record, shall run in the name of the State of Missouri."

The Judge of the Circuit Court of Saline County, when he rendered and recorded his judgment, clothed with the authority of the State, is and was the State of Missouri as was the Judge in the case of *Kring* v. *State of Missouri*, 107 U. S. 221; and the same as the Judge in the case of *Pyle* v. *State of Kansas*, 317 U. S. 213.

In *Chicago, B. & Q. Ry. Co.* v. *Chicago*, 66 U. S. 226, 41 L. Ed. 979, Justice Harlan, in speaking of the 14th Amendment, said:

"The prohibitions of the Amendment refer to all the instrumentalities of the state, to its legislative, executive and judicial authorities, and therefor, whoever by virtue of public position, under a state government, deprives another of any right, prohibited by that Amendment against the privation by the state, violates the constitutional inhibitions; and as he acts in the name of and for the state, and is clothed with the state's power, his act is that of the state. This must be so, as we have often said, or the constitutional prohibition has no meaning, and the state has clothed one of its agents with power to annul or evade it. *Ex parte Virginia*, 100 U. S. 339-346-347; *Neal* v. *Hopkins*, 118 U. S. 356; *Gibson* v. *Mississippi*, 162 U. S. 570; *Scott* v. *McNeal*, 154 U. S. 34."

To the same effect, are:

Virginia v. *Rives*, 100 U. S. 313-318-347.
Home Tel. Co. v. *Los Angeles*, 227 U. S. 278.
12 Corpus Juris, pages 1195-1196, Section 961.

Petitioners say that they are entitled to be protected in the manner provided for by the Constitution of the United States, by the Constitution of Missouri, and by the laws of the state in force at the time of the acts set forth in the complaint.

If the statutes of Missouri had been fully complied with, and no fraud on the court committed in the procurement of the judgment, then petitioners herein would have no complaint. It was not the specific acts of the respondents which violated the laws of Missouri, but it was the acts of the court who represented the judicial branch of the state, which crystallized the acts of the parties into a judgment; and it is this judgment, which can only be enforced by the state, that absorbs the rights and properties of petitioners; therefore, it stands out beyond question or contradiction, that the judgment, the final act of the state, is the means by which petitioners herein have been denied equal protection of the laws and their rights and properties have been taken; and it is these

acts, according to the Constitution of the United States, which are prohibited. Thus, all of the fraudulent acts of the individuals, comprised within the litigation, have been crystallized into the one act of the state, that of rendering the judgment.

Justice Strong, in *Virginia* v. *Rives*, 100 U. S. 313, 318, 347, in discussing the application of the Amendment, says:

> "The constitutional provisions, therefore, must mean that no agency of a state, or the officers or agents by whom its powers are exerted, shall deny to any person equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and, as he acts in the name of and for the state, his act is that of the state. This must be so, or the constitutional prohibition has no meaning."

POINT III.

The Judgment Below Should Be Reversed for the Reason That Frank Bush's Sworn Statement, Application to Be Made a Plaintiff and Adoption of the Complaint, a Copy of Which He Attached to His Affidavit, All Voluntarily in Good Faith Made and Filed by Him by Permission of the District Court May Not Be Abrogated by a Later Unsworn, Inconsistent, Contemptuous, Ancillary, Purported Entry of Appearance As a Defendant, in Purposed Trick to Deceive the Court and Divest It of Jurisdiction, When He Is Not an Indispensable Party, and, under the Rules of the Procedure for District Courts, Should Be Aligned As an Involuntary Plaintiff.

The Circuit Court of Appeals held that the trial court properly held that the necessary diversity of citizenship was lacking to give a Federal Court jurisdiction on that

ground (R. 78). The opinion continues in a lengthy inaccurate specious *obiter* argument, glossing and overlooking the trick and contempt of court, had and perpetrated by Frank Bush, to defeat jurisdiction (R. 78-81).

Frank Bush, citizen of Oklahoma $2,000 blood heir interest in the estate, $500 legatee in the forged will, being informed of the District Court order to make all heirs and legatees parties, read the complaint, examined photostat of the will, pronounced it a forgery and counterfeit, voluntarily on oath by entry of appearance filed November 3, 1941 (R. 35), adopted and annexed the complaint, prayed to be a party plaintiff, stated he did not want a legacy in a forged will. On the eve of trial six months later, April 20, 1942, his brother, William Bush, Kansas City attorney, unenrolled on the court roster, served and filed (R. 36-37), with leave, an unauthenticated, unsworn withdrawal, recantation, repudiation, rescission and abjuration of his sworn adoption of the complaint, entry of appearance and prayer as plaintiff. Interrogation of Bush by the court was not had, and was denied to counsel for plaintiff; defendants' counsel, like the master bird dog with head high taking the scent from the air, immediately advantaged themselves of the offside forward pass and trick play, by filing their motion to dismiss for incomplete diversity of citizenship (R. 38-9-40), on the same day at which plaintiff filed motion (R. 41-46) to set aside the order permitting the Frank Bush trick and contempt of court. The opinion misconceives the nature of the action as a statutory will contest, instead of an action in equity to deprive forgers and thieves of their plunder; and, by *obiter*, holds (R. 80) Frank Bush "could not, under Missouri law, be a proper party plaintiff" to prosecute the forgers of the will, of their making, that gives him a legacy of $500 but disinherits him of $2,000. Equity is the judicial process to prevent using the law to effect injustice. The ordained purpose of the Constitution does not permit tricking the court of jurisdiction to effect jus-

tice or deprive a party of his day in court, nor the aligning of purity with pollution, or honesty and righteousness, with thievery and perjury. Holding, that Frank Bush, innocent legatee of perjury and forgery, may not assail it, but must uphold it and defend it, makes equity impotent, dethrones the blinded Goddess of Justice and enthrones Beelzebub.

Jurisdiction is the judicial soul of jurisprudence, the Immortality of Justice, and untrickable.

Bush Not an Indispensable Party.

The complaint is against Com P. Storts, Leta Butler, Rozell Griffith and Laura Thomas Sheppard as conspirant producers of a counterfeit will, and nowhere in the complaint is there any charge made against Frank Bush, or any other legatee, as having any part in said fraud and conspiracy; therefore, Frank Bush is not a proper, a necessary, nor an indispensable party to this action.

The court sustained defendants' motion to dismiss, delimited, to incomplete diversity of citizenship of necessary parties, upon Frank Bush's *ipsa dixit* corrupt switch to a party defendant. Only indispensable parties, so made by the complaint, fix the jurisdiction. Wishes, whims, nor tricks of sordid interests do not determine indispensability.

Ancillary.

When a case is before the court with proper parties, then other parties, who if they had been originally made parties, may on their own application come into the case without affecting the jurisdiction of the court. This exception is based on the fact that such complaint or application is an intervention, and would only be ancillary to the main suit, in which event, diversity of citizenship is not necessary to confer jurisdiction. *Wichita R. & L. Co.* v. *Pub. U. Com.*, 260 U. S. 48, 67 L. Ed. 124-128; Equity Rule 37; Rule 8 (a) (1), Rules of Civil Procedure for District Courts.

The bringing in of new parties under the rule is subject to the proviso that joinder of such new parties must not defeat the federal jurisdiction. *Lowery Co.* v. *Nat'l City Bank*, 28 F. 2d 895. Therefore, the court should have either dismissed Bush's second application, or made him an involuntary plaintiff, as provided in Rule 19 (a), Rules of Civil Procedure for District Courts.

Citizenship Not Essential.

When a federal question is the basis of jurisdiction, the citizenship of the parties is not material nor essential to vest jurisdiction in the court. *Mosher* v. *Phoenix*, 287 U. S. 29, 77 L. Ed. 148.

Furthermore the right to raise the jurisdictional question is a privilege personal to the party being sued out of his own state, and cannot be raised by co-defendants. *Camp* v. *Gress*, 250 U. S. 308, 63 L. Ed. 997; *Central Trust Co.* v. *McGeorge*, 151 U. S. 129, 38 L. Ed. 98; *St. Louis Ry. Co.* v. *McBride*, 141 U. S. 131, 35 L. Ed. 659, 661.

POINT IV.

The Circuit Court of Appeals Erred in Misconceiving the Nature of This Action in the District Court, Considering It on the Basis of a Statutory Will Contest, Instead of an Original Action in Equity, to Prevent the Law from Forcing Injustice, Guard Rights, Protect Privileges and Immunities of Citizens of the United States, and to Enjoin and Deprive Forgers and Thieves of Their Plunder Taken under the Mantle of an Official Act of the State; and Said Misconception of the Court Is Extended to the Application of the Facts, to the Statutes and the Decisions of the Courts of Missouri.

The complaint is not a suit to contest a will. It is an action in Equity, appealing to the Constitution of the United States for protection against its violation in the taking of property without due process of law and disre-

garding rights, titles, privileges and immunities of citizens of the United States; and to enjoin wrong doers from enjoying the fruits of their iniquity.

The complaint (R. 1 to 10) names four parties, namely: Com. P. Storts, Leta Butler, Rozell Griffith and Laura Thomas Sheppard as conspirant manufacturers and producers of a counterfeit will, who, in order to effectuate their purpose to cheat and defraud the heirs of Laura E. Saltonstall, took possession of her lifeless body, home and property, took money and other property from the locked trunk, destroyed testatrix' 1935 will, which gave the property to her brothers, sisters and their children, among whom are petitioners, and substituted therefor a bogus paper, with two dates, as the will of testatrix, wherein Leta Butler, Rozell Griffith and Laura Thomas Sheppard, all strangers to her blood, are the chief beneficiaries and devisees. Against only these four parties is relief asked, they being the only indispensable parties to the cause (R. 1-10).

No relief is asked against Frank Bush or other heirs at law, because they are not involved in the frauds or perjury and had no part in manufacturing the counterfeit will, and are not affected by a judgment against the four respondents. Frank Bush at the time of the contest suit was incapable of being a party therein, because his mother was alive. However at the time of the institution of the action in Equity, his mother was dead; and he was then a legal heir and, with all other legal heirs, innocent of the charged wrong doing, alleged against the four respondents. None of said heirs at law should either in Equity or in law, be made to defend or uphold a forged document.

By the ruling of this opinion, Frank Bush and all other devisees and legatees, innocent of forgery or perjury, become and are accessories after the fact, and must uphold and defend the admitted forgery and perjury and suffer real loss by abandoning their interest in the estate, which is four times greater than they can receive under the counterfeit will.

The rules applicable to the facts in an Equitable proceeding should not be confused with rules of law applicable to facts in a will contest suit. The confusion doubtless resulted in attempting to apply the law regulating will contest suits, which were presented to show that in the will contest suit, where the judgment was obtained, the law had been violated, resulting in no service of summons, no notice, and no due process of law and therefore a violation of the Constitution of the United States.

The statutes of Missouri declare a certain rule. The courts of Missouri construe that statute and give its intended meaning, while this opinion emasculates both of them.

Missouri Constitution and Statutes.

The judgment of the Circuit Court of Saline County, Missouri, violated and contravened Sections 4-10-30 of Article II of the Constitution of Missouri, and also Sections 306-528-716-724-727-728-741-748 of the Revised Statutes of Missouri, for the year 1929, then in force at the time the matters complained of herein transpired.

Refusal by the state court to apply the constitutional and statutory provisions of the law, in force at the time, is a denial of due process, and equal protection of the laws, guaranteed by the United States Constitution. *Kring* v. *State of Missouri*, 107 U. S. 221; *Pyle* v. *State of Kansas*, 317 U. S. 213.

Sec. 306, R. S. Mo., 1929, on Descents and Distributions:

> "When any person having title to any real estate of inheritance, or personal estate, shall die intestate, it shall descend and be distributed in parcenary to his kindred * * *"

Sec. 528, R. S. Mo., 1929, on Proof of Wills:

> "The Probate Court, or the judge or clerk thereof, in vacation, *subject to the confirmation* or rejection

by the court, shall take proof of last wills and of the date of the death of the testator."

Sec. 716, R. S. Mo., 1929, In Suits Against Infants:

"After commencement of a suit against an infant defendant, *and the service of process upon him,* the suit shall not be prosecuted any further until a guardian for such infant be appointed."

Sec. 724, R. S. Mo., 1929, Suits, how Instituted:

"The filing of a petition in a court of record * * * and suing out of process therein, shall be taken and deemed the commencement of a suit."

Sec. 727, R. S. Mo., 1929, Writs:

"The original writ shall be a summons which shall be directed to the officer to be charged with the execution thereof, and shall command him to summons the defendant to appear in court on the return day of the writ, and at a place to be specified in such writ to answer the petition of plaintiff."

Sec. 728, R. S. Mo., 1929, Writs how Served:

"A summons shall be executed * * * first, by reading the writ to the defendant and delivering to him a copy of the petition; or, second, by delivering to him a copy of the petition and writ * * *"

Sec. 741, R. S. Mo., 1929, Publication to Issue on Return of Non-est:

"When * * * summons shall be issued against any defendant and the sheriff to whom it is directed shall make return that defendant cannot be found, the court being first satisfied that process cannot be served, shall make an order, as is requried in said section" (No order was made).

Sec. 748, R. S. Mo., 1929, Service on Non-residents:

"Plaintiff may cause a copy of the petition, with a copy of the summons, to be delivered to each defendant residing or being without the state, at any

> place within the United States or their territories, 20 days before the commencement of the term at which such defendants are required to appear; * * * service of process in conformity with this section shall be effectual within the limits of this state as personal service within the state" (No service under this section).

By virtue of Sec. 306, R. S. Mo., 1929, your petitioners are vested with titles to property in Missouri as heirs of Laura E. Saltonstall, deceased, which were sought to be affected in the state court litigation, at which your infant petitioners were never served with copy of petition and writ as commanded by Sec. 716, R. S. Mo., 1929, and unless and until first so served, the state court had no jurisdiction over them, and was prohibited from proceeding any further. These statutes direct how an infant shall be served, and unless and until strictly complied with, a minor is not in court for any purpose.

Sec. 716, R. S. Mo., 1929, has many times been consttued by the courts of Missouri to mean that it shall be a personal service on each minor named as a defendant, and no other kind of service can take an infant into court, and all proceedings without such personal service on such minor, are null and void. In other words, the Court where cause is pending has no jurisdiction, power or authority to make any order or judgment affecting said infants, unless and until such infant has been personally served.

The Court below, in its opinion on the service of infants, was confused and over looked the character of the attempted substitute service of minors. At the commencement of the will contest suit at which time publication was first obtained, the petition filed did not mention the names of these infant petitioners; but later, by an amended petition, each of said infant petitioners was named as a defendant therein. Thus under the first publication, it did not and could not affect or give notice to infant petitioners. The subsequent alias publication re-

quired an order of court before the publication could be legal, but there was no order of court and the attempted publication was null and void.

The Courts of Missouri emphatically declare that infants must be personally served with process as follows:

Westmeyer v. *Gallenkamp*, 154 Mo. 28, 55 S. W. 231, Court says:

> "By a long line of uniform and well construed cases, the doctrine has been well established that infants must be served with process the same as adults, and that unless so served in the manner provided by law, the court has no jurisdiction over them; and the appointment of a guardian *ad litem* for them, without such service, is void, and the proceedings thereon are *coram non judice*. *Hendricks* v. *McLean*, 18 Mo. 32; *Smith* v. *Davis*, 27 Mo. 298; *Baumgartner* v. *Guessfield*, 38 Mo. 37; *Gibson* v. *Chouteau*, 39 Mo. 537; *Shaw* v. *Gregorie*, 41 Mo. 407; *Ry. Co.* v. *Campbell*, 62 Mo. 537-585; *Campbell* v. *Gas Co.*, 84 Mo. 352; *Fisher* v. *Sickman*, 125 Mo. 165; *Bogart* v. *Bogart*, 138 Mo. 419, 40 S. W. 91; and such also seems to be the doctrine established generally by the great weight of authority, 10 Enc. of P. & P. 645. Here, the plaintiffs were infants of tender age. They were not served in the manner provided by law. They never had their day in court. They could neither acknowledge nor waive service of process, by which alone they could be subjected to the jurisdiction of the court, nor could they appear therein to protect an interest, and the cases furnish no authority for holding that the service on them was merely irregular and not void. The judgment of the Circuit Court will be reversed, cause remanded, with directions to enter judgment for plaintiffs in accordance with views expressed in this opinion."

Process must be served on infants in accordance with Sec. 716, R. S. Mo., 1920, otherwise infants are not in court, and all proceedings relative to them are void. *Scott* v. *Royston*, 223 Mo. 568, 123 S. W. 454; *Captain* v. *Mississippi Valley Trust Co.*, 240 Mo. 495, 144 S. W. 466.

Scott v. *Royston,* 223 Mo. 568, 123 S. W. 454-465-467:

> "The fifth section contemplates that the copy of the petition and the notice will be served on all parties before the case is submitted to the court at all; and this section (Sec. 716) while providing that the court shall take no steps against a minor defendant until the guardian has been properly appointed, and making it lawful for the court to appoint a guardian for him, presupposes that the minor defendants have been brought before the court according to law for that purpose. But until he is brought into court by a service of the petition and notice upon him—there is not the least warrant either in the statutes, or the common law, or in equity, for any authority in the court to appoint a guardian for him, or to do any judicial act in the premises affecting his rights and estate."

Judgment of State Court Is a Nullity.

The proceedings by probate judge of Saline County, in vacation, not being confirmed by a subsequent order in term-time by Probate Court as required by Sec. 528, R. S. Mo., 1929, vitiates the attempted probation, deprives the Circuit Court of jurisdiction to try the case, and nullifies its attempted judgment.

Callahan v. *Huhlman,* 343 Mo. 625, 96 S. W. 2d 704-706:

> "In effect, in the present case, it is conceded that there was no confirmation of the Probate Court in term-time of the proceedings had before the judge in vacation, relative to the probating of the will in question, therefore, the will was not probated. *Smith* v. *Estes,* 72 Mo. 310; *Barnard* v. *Bateman,* 76 Mo. 414; *Snuffer* v. *Howardton,* 124 Mo. 613, 28 S. W. 166; *Rothwell* v. *Jamison,* 147 Mo. 601, 610, 49 S. W. 503; *Farris* v. *Burchard,* 242 Mo. 8, 145 S. W. 825. And not having been probated, the will has never yet become effective. *Farris* v. *Burchard, supra.* Since the contest of a will, or a suit to establish a will, in the

> Circuit Court after rejection in the Probate Court is to be considered in effect as an appeal from the Probate Court, it follows that there can be no jurisdiction in the Circuit Court to entertain such suit or appeal, until there is a judgment, probating or rejecting a will in the Probate Court."

Sec. 741, R. S. Mo., 1929, requires *non est* returns to be made and a finding by the trial court before any publication can be lawfully made, and a publication made without *non est* returns, or without said order is void, and renders the judgment rendered therein a nullity. Publication relied on by Respondents was illegal, because it failed to comply with the requirements of the Statute. As said in *Kelly* v. *Murdock*, 184 Mo. 377, 83 S. W. 437:

> "The order of publication was not made in conformity to the statute; therefore, the notice as published, gave the court no jurisdiction of defendants and the judgment founded on it is void."

Tooker v. *Leak*, 146 Mo. 419, 48 S. W. 638, 642:

> "The action of the court, and the grounds of that action are clearly and unmistakably apparent on the face of the record from which it appears that the order of publication was not made under Section 2024, under which it possibly might have been made, and that it was made under Section 2022, without any authority whatever for making it, and having been thus made, without authority of law, the order was void. The defendants were not notified as required by law. The judgment rendered thereon was void."

Matters Overlooked.

In the motion for rehearing herein, on pages 87-92 of the Transcript of the Record, the court's attention was called to matters overlooked; and the overlooking may have been occasioned by misconception of the nature of

the action. As an illustration of said misconception, the court's attention was called to Sec. 716, R. S. Mo., 1929, now Sec. 867, R. S. Mo., 1939, which is in a separate Article 2, headed "Infants as Parties" and declares as follows:

> "After commencement of a suit against an infant defendant, and the service of process upon him, the suit shall not be prosecuted any further until a guardian for such infant be appointed."

Our courts declare this statute means that the infant shall be personally served before anything else can be done and unless so personally served, all proceedings following are void. *Westmeyer* v. *Gallenkamp*, 154 Mo. 28, 55 S. W. 231; *Scott* v. *Royston*, 223 Mo. 568, 123 S. W. 454, 467.

Your petitioners, infant citizens of Oklahoma, are citizens of the United States, and, by the United States Constitution, Section 2, Article IV, and Section 1, the 14th Amendment, are guaranteed immunities, privileges and rights in the Missouri courts the same as infant citizens of Missouri are accorded therein. *Kring* v. *State of Missouri*, 107 U. S. 221; *Pyle* v. *State of Kansas*, 317 U. S. 213 (2).

Admitted Facts.

Respondents' motion to dismiss the cause for want of jurisdiction, and their approval and adoption of Frank Bush's appearance and withdrawal, admits and confesses, as true, the factual averments of the complaint, and authorizes entry of judgment for petitioners, enjoining respondents from taking, keeping or having the benefits of the judgment.

Conclusion.

We respectfully submit that the Federal Question involved in this case is substantial, and calls for the exercise by this Court of its supervisory powers, by granting

a Writ of Certiorari and thereafter reviewing and reversing the decision of the said Circuit Court of Appeals.

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